STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 127489

- vs -

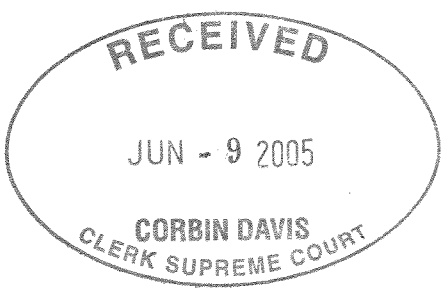
JOSEPH ERIC DROHAN,

Defendant-Appellant.

Court of Appeals No. 249995
Oakland County CC No. 02-187490-FH

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED



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STATEMENT REGARDING JURISDICTION

This matter is before this Honorable Court pursuant to the Order (28a) issued on March 31, 2005 in which this Court granted the application of the Defendant-Appellant for leave to appeal from the October 12, 2004 published Per Curiam Opinion of the Michigan Court of Appeals. (Cavanagh, P.J., and Fitzgerald and Meter, JJ.) (20a-27a) The Court of Appeals affirmed the Judgment of Sentence issued by the Hon. Deborah G. Tyner of the Oakland County Circuit Court on June 13, 2003. (18a-19a)

This Court, in its order granting leave to appeal, directed the parties to address the question whether the United States Supreme Court's decisions in *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed2d 403 (2004), and *United States v Booker*, 543 US ___, 125 S Ct 738, 160 L Ed2d 621 (2005), apply to Michigan's sentencing scheme in light of Footnote 14 found in *People v Claypool*, 470 Mich 715, 684 NW2d 278 (2004).

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STATEMENT OF QUESTION PRESENTED

QUESTION NO. 1: DID THE ASSESSMENTS OF TEN POINTS FOR OFFENSE VARIABLE 4, *PSYCHOLOGICAL INJURY TO A VICTIM*, FIFTEEN POINTS FOR OFFENSE VARIABLE 10, *EXPLOITATION OF A VULNERABLE VICTIM*, AND FIVE POINTS FOR OFFENSE VARIABLE 12, *NUMBER OF CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS*, MADE BY THE TRIAL COURT JUDGE AT SENTENCING, CONSTITUTE A VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE FACTS UPON WHICH THOSE ASSESSMENTS WERE BASED WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT DURING THE DEFENDANT-APPELLANT'S TRIAL?

PLAINTIFF-APPELLEE'S ANSWER: NO

DEFENDANT-APPELLANT'S ANSWER: YES

THE TRIAL COURT DID NOT ADDRESS THIS SPECIFIC CONSTITUTIONAL QUESTION.

COURT OF APPEALS' ANSWER: NO

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On May 13, 2003 the Defendant-Appellant, JOSEPH ERIC DROHAN, was found guilty of one count of third degree criminal sexual conduct, contrary to MCLA 750.520d(1)(b), and of one count of fourth degree criminal sexual conduct, contrary to MCLA 750.520e(1)(b), following a four day jury trial conducted in the Oakland County Circuit Court. (94a) The defendant was found not guilty of a second charge of fourth degree criminal sexual conduct. (94a) The trial had been presided over by the Hon. Deborah G. Tyner. (32a) The defendant acknowledged being an habitual felony offender, third offense, contrary to MCLA 769.11, immediately after the jury rendered its verdicts. (95a-96a)

The prosecution's theory of the defendant's guilt was to the effect that the defendant had made repeated sexual assaults upon a co-worker, Rebecca Curry, at their place of employment during the period beginning about July 17, 2002 and ending about October 25, 2002. (33a)

The first incident was alleged to have occurred on July 17, 2002 while the complainant and the defendant were together at work. He allegedly took the complainant's hand and forced her to touch his penis over his clothing. (34a) The second incident was alleged to have occurred two days later. Then the defendant allegedly forced the complainant to perform fellatio on him while they sat together in his automobile in the parking structure of their place of employment. (34a-35a) The third incident allegedly occurred on October 25, 2002 at work. The defendant was alleged

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again to have taken the complainant's hand and forced her to touch his penis over his clothing. (36a)

The defense to be presented was one of consent. (39a-40a) Defense counsel told the jury that the sexual encounters between his client and the complainant were a part of an affair that they carried on at work. (41a-42a)

In his opening statement the assistant prosecutor also told the jury that evidence would be presented regarding the defendant and other incidents of sexual assault which involved different women. (37a-38a) He explained the details of those other incidents and what he expected that the complainants in those matters would say when they testified. (37a-38a)

Prior to the trial the People filed a motion to admit evidence of the defendant's other crimes, wrongs or acts, pursuant to MRE 404(b), which included the allegations made by two women. One of those complainants, Rachel Bridgett, would testify that the defendant had begun fondling her buttocks and masturbating himself as she was sleeping in his home as a guest of his wife. The second woman, Heather Walbecq, would testify that, while he was a passenger in her automobile, the defendant had tried to fondle her thigh and breast while he attempted to force her hand to touch his naked penis. She would also state that the defendant had been masturbating while this took place.

The People maintained that this evidence showed a common plan or scheme of choosing a victim and a common method of using surprise to attack them. (29a-30a)

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On February 19, 2003 that motion was granted over the objection of defense counsel. (31a)

Rebecca Curry testified that she had been employed at Medicaid Assistance Services in Birmingham, Michigan in October of 2001 when the defendant began to work there. (43a-44a) She stated that she was friendly with the defendant until July of 2002. (44a) She said that she did not have any relationship with the defendant outside of work. (44a) She said that prior to the complained of incidents she had had no physical contact with the defendant. (45a)

Ms. Curry testified that on July 17, 2002 the defendant asked her to help him with the computer in his work station cubicle. (45a) She stated that while there the defendant grabbed her hand and placed it upon his penis over his clothing. (45a) She said that he rubbed her breast with his other hand. (45a) She said that the defendant told her that she "...had made him hard and that he wanted me to make him come". (45a) She said that she was startled by what had happened. (45a-46a) She said that she pulled away from the defendant and returned to her own work cubicle where she sat down and cried. (45a-46a) She said that she was scared and that she did not report the incident to anyone. (46a)

Ms. Curry testified that two days later, at about 2:00 p.m., the defendant approached her in her cubicle, grabbed her hand and placed it on his crotch. (48a) She stated that the defendant told her that "...we should get together and fuck". (47a) She said

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that she did not tell anyone about this because it made her nervous. (48a)

Ms. Curry testified that at about 4:00 p.m. on that same day the defendant approached her in the parking structure as she was walking toward her car. (49a) She stated that he grabbed her by the arm and forced her to sit in the passenger seat of his vehicle. (50a) She said that the defendant then got into the driver's seat, pulled his penis out of his pants and told her that he wanted her to suck it. (51a) She said that when she refused the defendant grabbed the back of her head and forced her to do so until he ejaculated. (51a-53a)

Ms. Curry testified that when the defendant finished ejaculating she got out of the vehicle. (53a) She stated that as she left the defendant told her not to bother to tell anyone. (53a) She said that his statement scared her and that she did not tell anyone. (53a-55a)

Ms. Curry testified that at the end of October of 2002 her company was moving its office to a new location. (56a) She stated that the employees were involved in the packing and moving. (57a) She said that she was working in one of the cubicles when the defendant came up behind her, grabbed her wrist and put her hand on his crotch. (58a) She said that he also made a sexual comment to her while doing this. (56a-59a)

Ms. Curry testified that she did not tell anyone about the incident until after the defendant left the employ of the company. (60a) She stated that first she told a co-worker. (60a)

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Then she told the president of the company and her husband. (61a) Finally she went to the Birmingham Police Department where she spoke with an officer and gave him a written statement. (61a-62a)

Ms. Curry testified that the defendant had grabbed her wrist and placed her hand upon his crotch and had touched her breasts about eleven or twelve other times during the period between July and October of 2002.

Det. John Hepner of the Birmingham Police Department testified that on November 5, 2002 he and his partner, Det. Ruby, met with the defendant in front of the defendant's home. (63a) He stated that the defendant agreed to answer their questions. He said that the interview took place in the detective's vehicle. (63a) He said that the defendant denied having a relationship with anyone at his place of employment. (64a) He said that the defendant said that he knew Rebecca Curry. (64a-65a)

Det. Hepner testified that the defendant told him that there had been sexual contact between he and Ms. Curry but that it was a mutual, consensual thing. (66a) He stated that the defendant explained the fact that Ms. Curry was now filing a complaint over their consensual sexual conduct by saying that another employee at their workplace, Rod Walbecq, had it in for him. (67a) He said that the defendant described his relationship with Ms. Curry as an office romance. (68a) He said that the defendant informed him that Ms. Curry had performed fellatio on him while they were sitting in his car in the parking structure at work. (68a)

During cross examination Det. Hepner acknowledged that the

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defendant had spoken voluntarily with him and Det. Ruby. (69a-70a) He agreed that speaking with two detectives in a police car parked in front of his home could make a person nervous. (69a) He said that the defendant told him about all of the incidents of sexual conduct between himself and Ms. Curry though he did not have to do so. (69a-70a) He said that the defendant told him that he suspected that his neighbor and former coworker, Rod Walbecq, was out to ruin his life. (69a)

The People rested after the testimony of the two witnesses who presented evidence of other acts, wrongs or crimes pursuant to MRE 404(b). (71a)

W. Bruce Knight testified that he was the owner of Medicaid Assistance Services. (72a) He stated that he had sixty eight employees and that his company has an employee handbook that is given to each employee. (73a) He said that the handbook sets forth a procedure for reporting workplace problems and a procedure for employee discipline. (73a-78a) He said that while Rebecca Curry had reported work related problems to him in the past she did not bring any complaint regarding the defendant to him while the defendant was employed at his company. (78a)

Carol C. Cottec testified that she is employed by the company that operates the parking structure where the employees of Medicaid Assistance Services parked their vehicles during 2002. (79a-80a) She said that her company maintained electronic records of the comings and goings of its tenants in the parking structure. (80a) She said that on July 18, 2002 the defendant's

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vehicle arrived at 7:55 a.m. and left at 1:55 p.m. (81a) She said that on July 19, 2002 the defendant's vehicle arrived at 8:13 a.m. and left at 1:05 p.m. (81a) She said that after the records for those two days had been retrieved the computer maintaining those records crashed and she was unable to retrieve any other similar records for July of 2002. (82a)

Mr. Drohan testified on his own behalf. (83a) He stated that in early November of 2001, shortly after he began his employment at Medicaid Assistance Services, Rebecca Curry approached him in his work cubicle and began to massage his shoulders and chest. (84a-85a) He said that she told him that she liked having him with her at work. (85a) He said that they spoke about getting together sometime. (85a)

The defendant testified that later during November of 2001 he and Ms. Curry sat together in his vehicle in the employee parking structure. (86a-87a) He stated that once in his car they spoke about scheduling a time to be together. (87a) He said that they then began to kiss and to touch each other sexually. (87a-88a) He said that Ms. Curry undid his belt and he then assisted her to expose his penis. (88a) He said that she then performed fellatio on him and that he ejaculated. (89a) He said that when they were done she got out of his vehicle and left. (89a)

The defendant denied that any force had been involved during the fellatio incident. (90a) He stated that thereafter he and Ms. Curry had engaged in seven or eight other episodes of mutual fondling. (90a) He said that the final incident occurred while

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the company was moving in October of 2002. (91a) He said that they did engage in some kissing while they were together in a moving truck. (92a)

The jury began its deliberations during the afternoon of May 12, 2003 following closing arguments and instructions. (93a) The jury continued its deliberations into the following day when it returned with its verdicts. (94a) The defendant was found guilty of the charge alleging fellatio, third degree criminal sexual conduct, and of the sexual contact charge from July 17, 2002. (94a) He was found not guilty of the October 25, 2002 moving day sexual contact allegation. (94a)

The Oakland County Probation Department conducted a presentence investigation in anticipation of the sentencing hearing that was held on June 13, 2003. (114a) It prepared a written Presentence Investigation Report (PIR) (97a-112a) which was submitted to the trial court prior to that hearing. A Sentencing Information Report (SIR) (113a), which calculated the minimum sentence range applicable to the defendant pursuant to his conviction for one count of third degree criminal sexual conduct, was also prepared. It set forth a minimum sentence range of from 51 months to 127 months. (113a)

Defense counsel objected to the assessment of ten points for Offense Variable (OV) 4, *Psychological Injury to a Victim*, the assessment of fifteen points for OV 8, *Victim Asportation or Captivity*, and the assessment of fifteen points for OV 10, *Exploitation of a Vulnerable Victim*. (116a-117a) The trial judge

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agreed that the defendant should not be assessed any points for OV 8. (116a) However she upheld the scoring of OV 4 and of OV 10. (115a and 118a-119a) She stated that the fact that the complainant had not received any psychological treatment did not preclude the assessment for OV 4. (115a) She stated that this case clearly involved predatory conduct pursuant to OV 10. (118a-119a)

The defendant was also assessed five points for OV 12, *Number of Contemporaneous Felonious Criminal Acts*. That assessment was made, pursuant to OV 12, for one contemporaneous felonious criminal act involving a crime against a person which allegedly occurred within twenty four hours of the sentencing offense and did not result in a separate conviction. (113a)

While the defendant's total OV score was reduced to fifty five points he remained in the C-V cell. The minimum sentence range remained at from 51 months to 127 months. (119a)

Defense counsel requested a minimum sentence at the low end of the guidelines. (121a) The assistant prosecutor asked the court to impose a minimum sentence above the high end of the guidelines due to the predatory nature of the circumstances of the instant case. (119a-121a) The defendant then made the following statement:

> MR. DROHAN: I think Mr. Spitzer has pretty much said it all. I would just like to get this over and go on with my life and more (sic) forward and become a better person when I get out. (122a)

The trial judge stated that the defendant had shown

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absolutely no remorse for his conduct and had given her no indication that he desired to change himself. (122a-123a) She said that he was a predator whose behavior had escalated to be more aggressive and more assaultive. (123a)

The trial judge stated that while she hoped that the defendant could be rehabilitated such rehabilitation would take an extensive period of time. (124a) She then imposed a minimum sentence of ten years and seven months and a maximum sentence of thirty years pursuant to the conviction for third degree criminal sexual conduct. A concurrent sentence of from one year to four years was then imposed for the fourth degree criminal sexual conduct conviction. (124a)

The appellant filed a claim of appeal of right in the Michigan Court of Appeals. There he argued that the trial judge had erred when she admitted the similar acts evidence involving the two other women, that there was insufficient evidence presented during his trial to support his two convictions, that the sentencing guidelines had been scored incorrectly and that the sentence imposed for third degree criminal sexual conduct, of from 127 months to thirty years, constituted cruel and/or unusual punishment.

On September 8, 2004 the appellant filed a supplemental authority regarding the guidelines issue in which he cited *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed2d 403 (2004), as well as this Court's decision in *People v Claypool*, 470 Mich 715, 684 NW2d 278 (2004). Appellate counsel cited and

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relied upon the *Blakely* decision during the oral argument that was presented in the Court of Appeals on October 5, 2004.

On October 12, 2004 the Court of Appeals issued a Per Curiam Opinion for publication in Docket No. 249995. In that Opinion the Court affirmed the appellant's convictions and sentences. (20a-27a)

On November 24, 2004 the appellant filed an application for leave to appeal with this Court in which he raised the issues that he had raised unsuccessfully in the Court of Appeals. He also argued that the United States Supreme Court's decision in *Blakely v Washington*, supra, was controlling authority on the sentencing guidelines issue. The appellant distinguished this Court's decision in *People v Claypool*, supra, and argued that the holding in *Blakely v Washington*, supra, does have application in Michigan.

On March 31, 2005 this Court issued an order in which it granted the appellant's application. (28a) It directed the parties to address the question whether the United States Supreme Court's decisions in *Blakely v Washington*, supra, and in *United States v Booker*, 543 US ___, 125 S Ct 738, 160 L Ed2d 621 (2005), apply to Michigan's sentencing scheme. (28a)

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STANDARD OF REVIEW

QUESTION NO. 1:

The standard of review for statutory interpretation is *de novo*. See *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003). The misapplication of the statutory guidelines is reviewed for legal error. See *People v Babcock*, supra, and *People v Mitchell*, 454 Mich 145, 560 NW2d 600 (1997). The standard of review for a constitutional question is *de novo*. See *People v Swint*, 225 Mich App 353, 572 NW2d 666 (1997), *People v Pitts*, 222 Mich App 260, 564 NW2d 93 (1997), and *People v White*, 212 Mich App 298, 536 NW2d 876 (1995).

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SUMMARY OF ARGUMENT

On June 13, 2003 the Defendant-Appellant, JOSEPH ERIC DROHAN, was sentenced to serve a minimum term of ten years seven months and a maximum term of thirty years pursuant to his jury trial based conviction for one count of third degree criminal sexual conduct and for being an habitual offender, third offense. The minimum sentence imposed was at the very high end of the minimum sentence range determined by the trial judge pursuant to her calculation of the statutory sentencing guidelines. That calculation included the consideration of three factors that had not been found by the appellant's jury beyond a reasonable doubt.

In June of 2004, and while the appellant's case was on direct appeal to the Michigan Court of Appeals, the United States Supreme Court issued its opinion in *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed2d 403 (2004). In it the Court held that the Sixth Amendment prohibits sentencing judges from considering facts related to issues, other than the defendant's prior criminal record, that have not been admitted to by the defendant or found by his jury at trial beyond a reasonable doubt when fashioning and imposing a sentence. It reversed the sentence imposed pursuant to Washington's statutory sentencing guidelines as a violation of the Sixth Amendment guarantee to a trial by jury.

In January of 2005 the Supreme Court invalidated the mandatory nature of the federal sentencing guideline system in *United States v Booker*, 543 US ___, 125 S Ct 738, 160 L Ed2d 621

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(2005), on Sixth Amendment grounds. That decision, like *Blakely v Washington*, supra, is the most recent in a line of cases all of which have held that sentences must be based on facts proven beyond a reasonable doubt. See *Jones v United States*, 526 US 227, 119 S Ct 1215, 143 L Ed2d 311 (1999), *Apprendi v New Jersey*, 530 US 446, 120 S Ct 2348, 147 L Ed2d 435 (2000), and *Ring v Arizona*, 536 US 584, 122 S Ct 2428, 153 L Ed2d 556 (2002), all of which will be discussed in detail in the Argument section of this brief, infra.

This Court's opinion in *People v Claypool*, 470 Mich 715, 684 NW2d 278 (2004), stated at Footnote No. 14 that the decision in *Blakely v Washington*, supra, has no application in Michigan because this state employs an indeterminate sentencing system.

The appellant submits that this Court's statement regarding the applicability of the United States Supreme Court's holding in *Blakely v Washington*, supra, is incorrect. The question to be determined is not one of determinate sentencing vs. indeterminate sentencing. Instead it is a constitutional question of whether criminal defendants are entitled to have their sentences fashioned solely on the basis of facts to which they have admitted or facts which have been proven at trial to their jury beyond a reasonable doubt. The United States Supreme Court has made it clear that the Sixth Amendment guarantees that a defendant cannot be sentenced on the basis of information, other than his prior record, that has not been proven to his jury

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beyond a reasonable doubt.

The minimum sentence inflicted upon the appellant of ten years and seven months was based, in part, upon three offense variables that were not proven to or found by his jury. That sentence is a violation of the Sixth Amendment and must be reversed. The argument that follows is based upon no less of an authority than the jurisprudence of the United States Supreme Court that has developed on this issue since 1999. The argument sets forth a detailed explanation of why the recent decisions of the United States Supreme Court, all of which are grounded in the Sixth Amendment, apply without question to Michigan's sentencing scheme.

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ARGUMENT

QUESTION NO. 1: DID THE ASSESSMENTS OF TEN POINTS FOR OFFENSE VARIABLE 4, *PSYCHOLOGICAL INJURY TO A VICTIM*, FIFTEEN POINTS FOR OFFENSE VARIABLE 10, *EXPLOITATION OF A VULNERABLE VICTIM*, AND FIVE POINTS FOR OFFENSE VARIABLE 12, *NUMBER OF CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS*, MADE BY THE TRIAL COURT JUDGE AT SENTENCING, CONSTITUTE A VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE FACTS UPON WHICH THOSE ASSESSMENTS WERE BASED WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT DURING THE DEFENDANT-APPELLANT'S TRIAL?

PLAINTIFF-APPELLEE'S ANSWER: NO

DEFENDANT-APPELLANT'S ANSWER: YES

THE TRIAL COURT DID NOT ADDRESS THIS SPECIFIC CONSTITUTIONAL QUESTION.

COURT OF APPEALS' ANSWER: NO

PROCEDURAL HISTORY

The Oakland County Probation Department conducted a presentence investigation in anticipation of the sentencing hearing scheduled for the Defendant-Appellant, JOSEPH ERIC DROHAN, which was held on June 13, 2003. It prepared a Presentence Investigation Report (PIR) as the product of that investigation. (97a-112a) A Sentencing Information Report (SIR) was also prepared. (113a) It calculated the minimum sentence range applicable to the appellant. He was placed in the C-V cell. The minimum sentence range was from 51 months to 127 months. (113a)

At the sentencing hearing defense counsel objected to the assessment of ten points for Offense Variable (OV) 4,

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Psychological Injury to a Victim. (114a) He pointed out that his client maintained that the act of fellatio had occurred in November of 2001. He stated that the complainant claimed that it had taken place in July of 2002. He argued that, while at least eleven months had passed since that incident, the complainant had not sought any psychological treatment. Further she had the means, through her employment provided insurance, to obtain such care if it had been needed. (114a)

The trial judge's response was that the fact that the complainant had not sought psychological treatment was not conclusive on the issue. Therefore she ordered that the defendant be assessed ten points for OV 4. (115a)

The Offense Variable at issue here, OV 4, is found at MCLA 777.34. It provides as follows:

> Sec. 34.(1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim.....10 points
> (b) No serious psychological injury requiring professional treatment occurred to a victim..0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive. (emphasis added)

Defense counsel then objected to an assessment of fifteen points for OV 10, *Exploitation of a Vulnerable Victim*, where the probation department had determined that predatory conduct was involved. OV 10 is found at MCLA 777.40. It provides in relevant

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part as follows:

> Sec. 40.(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved . . . . 15 points
>
> * * * * *
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. (emphasis added)

Defense counsel pointed out that the defendant and the complainant were about the same age. He said that the complainant had no physical disability or mental disability that the defendant had exploited in this case. (116a) The assistant prosecutor argued that the defendant was a predator because he had exploited the complainant's psychological state and her friendship for him to insure that she would not report him to the authorities. (117a)

The trial judge ruled that the assessment of fifteen points for OV 10 would stand. She said:

> THE COURT: It's scored at 15, the exploitation of a vulnerable victim -- is predatory conduct was involved. This case clearly involves that. Manipulative victim, exploit victim for selfish purposes, predatory means pre-offense conduct directed at victim for the primary purpose of

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victimization. Vulnerability, clearly this victim, anyone who observed her demeanor on the stand would assess or attest to her vulnerability. She was what I would classify as readily susceptibility of a victim. To persuasion, to psychological injury based on her past.

According, if I believe the defendant's story, she consistently went to the defendant with complaints about her marriage, the fact she couldn't handle it. All these factors are not conclusive but in this court's mind and based on all the testimony hear in this trial, considering the 404-B conduct, considering the conduct the defendant exhibited toward the victim in this case, this is an extremely appropriate scoring. Predatory conduct is exactly how I would describe the defendant in this case. Motion denied. (118a-119a)

The probation department also assessed the defendant five points for OV 12, *Contemporaneous Felonious Criminal Acts*. (113a) Defense counsel did not object to this assessment and it was not addressed on the record. The assessment was made for an offense for which the defendant had not been and would not be convicted.

OV 12 is found at MCLA 777.42. It provides, in relevant part, as follows:

> Sec. 42.(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * * * *
>
> (d) One contemporaneous felonious criminal act involving a crime against a person was committed . . . . . 5 points
>
> (e) Two contemporaneous felonious criminal acts involving other crimes were committed . . . . . 5 points
>
> * * * * *
>
> (2) All of the following apply to scoring offense variable 12:
>
> (a) A felonious criminal act is contemporaneous if both of the following circumstances exist:
>
> (i) The act occurred within 24 hours of the sentencing

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offense.

(ii) The act has not and will not result in a separate conviction.

(b) A violation of section 227b of the Michigan penal code, 1931 PA 328, M CL 750.227b, should not be considered for scoring this variable.

(c) Do not score conduct scored in offense variable 11.
(emphasis added)

There are two ways that a defendant can receive an assessment of five points for OV 12. He could be so assessed for one offense against a person or for two offenses not involving a person. MCLA 777.42(1)(d) and (e). In either event the assessment is made because someone other than the trier of fact has found the defendant guilty of one or even two crimes for which he was not tried or convicted.

The negative effect of the erroneous guidelines rulings has been and continues to be devastating for the appellant. Had the trial judge sustained either of the two objections to the guidelines scoring made at the time of sentencing and addressed here the total offense variable score would have been reduced by at least ten points. The defendant's OV level would then have been reduced to level IV. Had both of the objections that he made at sentencing been sustained the defendant's total offense variable score would have been reduced to thirty points. The OV level would then have been reduced to level III. An assessment of zero for OV 12 would have helped to insure that favorable outcome.

The minimum sentence range for the C-IV cell is from 45

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months to 112 months. The minimum sentence range for the C-III cell is from 36 months to 90 months. The appellant's minimum sentence was set at the high end of the C-V cell, 127 months. The high end of the C-IV cell would be 112 months. The high end of the C-III cell would be 90 months. Had the guidelines been scored properly the reduction in the length of the applicable minimum sentence would have been significant.

The Court of Appeals held that the trial court's scorings of both OV 4 and OV 10 were supported by the record and correct. Accordingly it affirmed those guidelines rulings. (25a-27a) In addition it rejected the appellant's argument that the United States Supreme Court's decision in *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed2d 403 (2004), applied to his case. Instead it cited and followed this Court's statement in *People v Claypool*, 470 Mich 715, 684 NW2d 278 (2004), found at Footnote No. 14, that the holding in *Blakely v Washington*, supra, does not affect Michigan's sentencing system. (25a-26a)

This Court has now granted the appellant's application for leave to appeal limited to the question of whether *Blakely v Washington*, supra, and *United States v Booker*, 543 US ___, 125 S Ct 738, 160 L Ed2d 621 (2005), apply to Michigan's sentencing scheme. (28a)

THE RELEVANT LAW AND ITS APPLICATION HERE

While the United States Supreme Court's holding in *Blakely v Washington*, supra, has caused considerable controversy and has

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been the object of substantial criticism it was not decided in a vacuum. Instead the opinion is the logical progressive result of a line of cases whose foundation is the right that every criminal defendant enjoys to have his case decided by a jury of his peers. That right is guaranteed by the Sixth Amendment to the United States Constitution. It provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (emphasis added)

If there was any question whether this constitutional guarantee is incumbent upon the states the Fourteenth Amendment, ratified in 1868, has clearly answered the question in the affirmative.

In *Jones v United States*, 526 US 227, 119 S Ct 1215, 143 L Ed2d 311 (1999), the defendant had been convicted by a federal district court jury of carjacking and of the use of a firearm in the commission of a crime of violence, or of aiding and abetting those crimes. At sentencing the trial judge found aggravating factors related to the serious injury sustained by the victim. Those factors were not specifically addressed to or found by the defendant's jury in its deliberations and verdict.

Those judicial findings led to the imposition of a more severe penalty, an increase of ten years in the maximum possible sentence. The sentence actually imposed was twenty five years

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rather than the fifteen year maximum sentence applicable to the elements of the crime that the jury found beyond a reasonable doubt. The Court of Appeals for the Ninth Circuit affirmed the sentence imposed.

Justice Souter wrote the opinion for the five to four majority. He was joined by Justices Stevens, Scalia, Thomas and Ginsburg. While he acknowledged that there was some legitimate confusion regarding whether a fact was an element of the crime charged or a sentencing factor he relied on the long standing rule that the elements of a crime "...must be charged in the indictment, submitted to a jury and proven by the Government beyond a reasonable doubt." (at p 232) He cited *United States v Gaudin*, 515 US 506, 115 S Ct 2310, 132 L Ed2d 444 (1995), and *Hamling v United States*, 418 US 87, 94 S Ct 2887, 41 L Ed2d 590 (1974), to support this principle. (at p 232)

The Court reversed the decision of the Court of Appeals. It held that the trial judge had considered facts that were not found by the defendant's jury in fashioning the twenty five year sentence imposed. The decision to reverse the sentence was grounded in the Sixth Amendment.

In *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000), the defendant pled guilty to firing several shots into the home of a black family, a crime whose penalty pursuant to state statute was from five years to ten years in prison. Prior to sentencing the prosecution filed a motion to enhance the defendant's sentence pursuant to the New Jersey hate

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crime statute. The trial judge found, by a preponderance of the evidence, that the shooting had been racially motivated. He then sentenced the defendant to twelve years in prison.

The Supreme Court considered the issue presented in the context of the Sixth and the Fourteenth Amendments. Justice Stevens wrote the opinion for the majority. He was joined by Justices Scalia, Souter, Thomas and Ginsburg. The Court reviewed the sentence imposed as a violation of the defendant's right to have his guilt of all elements of a crime proven beyond a reasonable doubt. Justice Stevens wrote:

> In sum, our reexaminaton of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [*Jones v United States*] 526 U.S., at 252-253, 119 S.Ct. 1215 (at p 490)

In *Ring v Arizona*, 536 US 584, 122 S Ct 2428, 153 L Ed2d 556 (2002), the defendant was convicted of first degree felony murder following a jury trial conducted in the Arizona state court. Arizona law provided that the death penalty could not be imposed unless the sentencing judge made a finding of certain aggravating factors, at a separate hearing, that would justify such a sentence.

Justice Ginsburg wrote the majority opinion of the Court in

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which she was joined by Justices Stevens, Scalia, Kennedy, Souter and Thomas. The Court reversed the death sentence that had been ordered due to the trial judge's findings of aggravating factors on Sixth Amendment grounds. In doing so the Court reversed a prior decision, *Walton v Arizona*, 497 US 639, 110 S Ct 3047, 111 L Ed2d 511 (1990), which had upheld Arizona's system of having the trial judge determine the existence of the aggravating factors necessary to support the imposition of the death penalty. Justice Ginsburg cited and relied upon the Court's decision in *Apprendi v New Jersey*, supra, to support the holding in *Ring*. She wrote:

> For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct 2348, the Sixth Amendment requires that they be found by a jury.
>
> * * *
>
> > "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ...If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).
>
> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion. (at p 609)

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In *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed2d 403 (2004), the Supreme Court reviewed the application of a state's sentencing guidelines as a violation of the Sixth Amendment guarantee to a trial by jury. Justice Scalia wrote the opinion for the five to four majority. He was joined by Justices Stevens, Souter, Thomas and Ginsburg. He stated that the sentencing judge cannot consider factors that were not specifically admitted to by the defendant during a plea of guilty hearing or found beyond a reasonable doubt by a jury during a trial when scoring the sentencing guidelines. To do otherwise, as has been the common sentencing practice in both state and federal courts applying their individual systems of sentencing guidelines, is an infringement upon the jury's power. Justice Scalia said that the jury system represents the sovereignty of the people and the reservation of power by the people as a check on the judiciary just as suffrage is a check upon the power of the executive and the legislative branches of government. (*Blakely v Washington,* supra, at pp 2538-2539)

The Court held that its decision in *Blakely* was simply the application of the rule it had announced in *Apprendi v New Jersey*, supra, in 2000 where Justice Stevens summarized the rule as follows:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
>
> (*Apprendi v New Jersey*, supra, at p 490)

The concept of the *statutory maximum* sentence on which both

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the *Apprendi* and *Blakely* decisions are based must be clarified. In *Blakely* Justice Scalia defined that term as follows:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring, supra*, at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi, supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.
>
> (at p 2537)
> (emphasis supplied)

Most recently, in *United States v Booker*, 543 US ___, 125 S Ct 738, 160 L Ed2d 621 (2005), the Supreme Court considered whether its holding in *Blakely v Washington*, supra, which affected that state's sentencing scheme, had application to the federal sentencing guidelines. It held that it most definitely did.

There the defendant had been convicted following a jury trial of possession with the intent to deliver more than fifty

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grams of cocaine. The evidence presented at trial was that he had 92.5 grams. The penalty provided by the applicable federal statute, 21 USC § 841(a)(1), is a minimum of ten years and a maximum of life in prison. The defendant's prior record and the facts found by the jury put him in a sentencing range, pursuant to the guidelines, of from 210 months to 262 months.

However the trial judge also considered other information that had not been presented to the jury when he fashioned the defendant's sentence. In particular there was evidence that the defendant had possessed an additional 566 grams of cocaine which the trial judge determined, by a preponderance of the evidence, to be true. That increased the sentencing range, pursuant to the federal guidelines, to between 360 months and life. The defendant received a sentence of 360 months.

Justice Stevens wrote the first part of the opinion in which he was joined by Justices Scalia, Souter, Thomas and Ginsburg. The Court held that the Sixth Amendment applies to the federal sentencing guidelines just as it applies to the sentencing system in Washington. He summarized the importance of the essential constitutional guarantee to have a jury find guilt beyond a reasonable doubt as follows:

> "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."
> (at p 752)

Justice Stevens concluded that the line of cases set forth above here controlled the issue and required that facts considered at sentencing beyond those concerning the defendant's

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prior record must be proven beyond a reasonable doubt. He said:

> All of the foregoing support our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We recognize, as we did in *Jones*, *Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial--a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment--has always outweighed the interest in concluding trials swiftly. *Blakely*, 542 U.S., at ___, 124 S.Ct., at 2542-43. As Blackstone puts it:
>
> "[H]owever *convenient* these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the most momentous concerns." 4 Commentaries on the Laws of England 343-344 (1769).
>
> Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. (at pp 755-756)

Justice Breyer wrote the second part of the opinion. He was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg. In it he fashioned a remedy that would save the federal sentencing guidelines by limiting the application of Justice Stevens' part of the opinion to the statutory provision of the sentencing guidelines that made them mandatory, 18 USC § 3553(b)(1), and the statute that set forth the standards for appellate review of sentencing departures, 18 USC § 3742(e). Therefore the federal sentencing guidelines are now advisory

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rather than mandatory.

Under Michigan's sentencing scheme the equivalent of Justice Scalia's definition of *statutory maximum* is the high end of the minimum sentence range as calculated and determined according to the statutory sentencing guidelines, MCLA 777.1 *et seq*.

This means that while the appellant's Prior Record Variable (PRV) score of 20 points is not at issue for purposes of this analysis the Offense Variable (OV) score of fifty five points is at issue. The appellant submits that OV 4, OV 10 and OV 12, which were scored against him, dealt with facts that were not decided by his jury. He received ten points for OV 4, fifteen points for OV 10 and five points for OV 12. His total OV score should have been twenty five rather than fifty five points.

The *statutory maximum* for purposes of *Blakely v Washington*, supra, and *Apprendi v New Jersey*, supra, analysis is 127 months. That is the high end of the minimum sentence range according to the trial judge's scoring of the sentencing guidelines applicable to the appellant. (119a)

However the guidelines score cannot consist of points for factors that the appellant's jury did not find beyond a reasonable doubt. That is why the three offense variables identified above, OV 4, OV 10 and OV 12, should all have been scored zero. Neither psychological injury or predatory conduct is an element of either of the two crimes for which the defendant was found guilty by his jury. Further, what could be a greater violation of the Sixth Amendment than to sentence a defendant on

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the basis of a crime for which he was not convicted as is the object of OV 12?

The total OV score found by the trial judge at sentencing was fifty five points. The total OV score that was found by the defendant's jury beyond a reasonable doubt is twenty five points. That score places the defendant in OV Level III. The minimum sentence range for the C-III cell is from 36 months to 90 months. The *statutory maximum*, pursuant to the definition of that term set forth in *Blakely v Washington*, supra, in that cell is 90 months.

This Court's decision in *People v Claypool*, 470 Mich 715, 684 NW2d 278 (2004), is said to reject the application of the holding in *Blakely v Washington*, supra, to Michigan's statutory guidelines. However the issue presented here was not the one decided in *Claypool*. Instead Justice Taylor, writing for the majority, framed the issue decided in that case as follows:

> The Court granted the prosecutor leave to appeal. We framed the issues on appeal as whether "sentencing manipulation" or "escalation" is a substantial and compelling reason justifying a downward departure from a statutorily imposed mandatory minimum sentence, and whether a trial court may consider the legislative sentencing guidelines recommendation when determining the degree of a departure, which has already been determined to be supported by substantial and compelling reasons. (at p 282)

However this Court did make a statement, in Footnote No. 14, to the effect that the *Blakely* decision has no application in Michigan. The reason given for that conclusion is that Michigan has an indeterminate sentencing system while Washington has a determinate sentencing system. Footnote 14 is reproduced here as

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follows:

> FN14. The Chief Justice argues that the United States Supreme Court's recent decision in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531, ___ L.Ed.2d ___ (2004), affects this case. We disagree. *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury. *Blakely, supra* at ___, 124 S.Ct. 2531.
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. M.C.L. § 769.8. The minimum is based on guidelines ranges as discussed in the present case and in *Babcock, supra*. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding.) Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment.
>
> Justice O'Connor in her dissent in *Blakely* raised a concern similar to the one the Chief Justice now raises, but the majority in that case made clear that the decision did not affect indeterminate sentencing systems. The Court stated:
>
> JUSTICE O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at 1-10 [124 S.Ct. at 2543-2548]. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of

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> course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely, supra*, at ___, 124 S.Ct. 2531 (emphasis added).] (at p 286)

The appellant respectfully submits that the position set forth in Footnote No. 14 in this Court's majority opinion in *People v Claypool*, supra, is incorrect. While it is true that the two decisions issued by the United States Supreme Court which led this court to grant leave here, *Blakely v Washington*, supra, and *United States v Booker*, supra, both involved determinate sentencing schemes that is not the basis upon which either of those cases was decided.

Instead the Supreme Court based its decision in each case on the Sixth Amendment and a criminal defendant's right to have every fact of the case upon which a sentence is to be determined proven beyond a reasonable doubt. The significance of *Blakely* and *Booker* is constitutional. The impact of those decisions is universal through out all of the fifty one jurisdictions that are made up by the fifty separate states of the Union and the federal system.

While this principle may appear to be new--due to the fact that it has upset a number of sentencing systems throughout the United States that have evolved over the past quarter century--a criminal defendant's right to a trial by jury is as old as the Constitution itself and, before that, the English common law.

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Justice Stevens recognized that fact in *United States v Booker*, supra, when he stated:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. See *Jones*, 526 U.S., at 244-248, 119 S.Ct. 1215. The Framers of the Constitution understood the threat of "judicial despotism" that could arise from "arbitrary punishments upon arbitrary convictions" without the benefit of a jury in criminal cases. The Federalist No. 83, p. 449 (C. Rossiter ed. 1961) (A. Hamilton) The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta. As we noted in *Apprendi*:
>
> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...'" 530 U.S., at 477, 120 S.Ct. 2348 (citations omitted).
>
> Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable. (at p 753)
>
> (emphasis added)

There is another statement in Footnote No. 14 of the *Claypool* opinion to the effect that *Blakely* has no application to the Michigan sentencing system because the *statutory maximum* in Michigan is set by the Legislature. However the *statutory maximum* described by this Court in *Claypool* is not the *statutory maximum* as was defined by the United States Supreme Court in *Blakely*. The

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holding in *Blakely* does have application here in Michigan as the *statutory maximum* pursuant to the United States Supreme Court's definition of that term in the context of the guidelines is the high end of the minimum sentence range just as it is in Washington. Further this same definition of that term was applied in *United States v Booker*, supra. (at p 749)

CONCLUSION

The minimum sentence imposed upon the Defendant-Appellant, JOSEPH ERIC DROHAN, was at the high end of the minimum sentence range of from 51 months to 127 months. The maximum sentence imposed was for thirty years. The minimum sentence range was determined by considering three factors, OV 4, OV 10 and OV 12, that were not presented to or found by the appellant's jury beyond a reasonable doubt. The Sixth Amendment to the United States Constitution guaranteed the appellant the right to have all of the factors related to the crimes for which he was sentenced to be proven to his jury beyond a reasonable doubt. The jurisprudential history set forth in this argument has made it exceedingly clear that here in the United States sentences can only be imposed upon the consideration of the defendant's criminal history and those offense variables that have been proven beyond a reasonable doubt.

This basic constitutional principle has universal application in all of the states of our Union and, in particular, here in Michigan. The fact that Michigan has an indeterminate sentencing system is a distinction that has no material effect on

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the United States Supreme Court's recent holdings in *Blakely v Washington,* supra, and in *United States v Booker*, supra, as those decisions are applied to the instant case. The constitutional principle is the controlling one. The statutory sentencing schemes of individual jurisdictions do not override the Constitution, its essence or its material benefits. Those benefits inure to all criminal defendants prosecuted in each of the jurisdictions of the United States.

The relief sought here by the appellant is to be resentenced in accordance with the United States Supreme Court's holdings in *Blakely v Washington,* supra, and in *United States v Booker*, supra. He seeks a sentence that, pursuant to the offense variables actually found by his jury at trial beyond a reasonable doubt, will be within the minimum sentence range properly applicable to him.

The larger question presented here is what remedy should be applied to Michigan's sentencing scheme. While Justice Breyer's solution to that question, as set forth in the second part of the Supreme Court's opinion in *United States v Booker*, supra, may be adopted here in Michigan so that the guidelines become advisory there is no constitutional requirement that that particular remedy be applied. The only thing required of this Court by the United States Constitution is that all criminal defendants' Sixth Amendment right to have all facts that form the basis of a sentence to be imposed upon them be proven to their jury beyond a reasonable doubt.

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RELIEF REQUESTED

The Defendant-Appellant, JOSEPH ERIC DROHAN, respectfully requests that the Per Curiam Opinion of the Court of Appeals that, inter alia, affirmed the ten year seven month to thirty year sentence imposed by the Oakland County Circuit Court on June 13, 2003, pursuant to his conviction for one count of third degree criminal sexual conduct, be reversed. He also requests that the Judgment of Sentence issued by the Oakland County Circuit Court on June 13, 2004 pursuant to that conviction be vacated. He further requests that this Court issue an opinion consistent with the authorities cited and arguments presented here. Finally the Defendant-Appellant requests that this matter be remanded to the Oakland County Circuit Court for a resentencing hearing to be conducted in accordance with the authorities cited and arguments presented here.

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May 22, 2005

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